92-1499

NO.

Supreme Court, U.S.
FILED
MAR 11 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,

Petitioner,

vs.

COLONIAL, INC.

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Stewart I Mandel, **Counsel of Record**

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I

QUESTIONS PRESENTED

1. Were Ohio municipalities, formed into a special island taxing district, denied equal protection of the laws under the Fourteenth Amendment to the United States Constitution by the Ohio Supreme Court, through its application of Ohio's constitutional requirement of uniformity for laws of a general nature in a tax collection suit, where the Ohio legislature vacated it's Ohio sales tax pre-emption on a limited basis in favor of the taxing district, restoring their constitutional power to levy a sales tax, where the Ohio legislature provided equal protection through reasonable classification?

2. Are island municipalities, formed into a special taxing district, a person within the meaning of the Fourteenth Amendment to the U.S. Constitution entitling them to equal protection of the laws?

II

PARTIES

The Petitioner to this action is:

The Put-In-Bay Island Taxing District Authority

The Respondent to this action is:

Colonial, Inc.

III

RULE 26.1 STATEMENT

Colonial, Inc. is a privately held corporation with no subsidiaries.

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

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OPINIONS BELOW

The opinions of the Court of Common Pleas of Ottawa County, Ohio including The Court of Appeals for Ottawa County, Sixth Appellate District of Ohio; and the Supreme

Court of Ohio appears in the Appendix hereto with the Common Pleas Court opinion appended to the Court of Appeals opinion.

JURISDICTION

The final judgment of the Court of Common Pleas of Ottawa County was entered on May 17 1990. A notice of appeal to Ottawa County Court of Appeals, Sixth Appellate District of Ohio, was filed June 15 1990. It rendered it's final judgment August 16 1991. The respondent's notice of appeal to the Supreme Court of Ohio was filed on September 1 1991. On December 11 1992 the Ohio Supreme Court rendered it's opinion on the merits. This court's jurisdiction is invoked under 28 U.S.C.§1254(1), 28 U.S.C. §1257(a) and 28 U.S.C.§2101(c).

CONSTITUTION INVOLVED

XVIV Amendment to the U.S.Constitution

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Ohio Revised Code §5739.101 through §5739.107 inclusive.

STATEMENT OF THE CASE

Ohio enacted a sales tax, Ohio Revised Code §5739.01 et seq., pre-empting municipalities constitutional power and authority to levy their own sales tax. This law is of a general nature and under

the Ohio Constitution it is required to operate uniformly throughout the State of Ohio.

The Ohio legislature amended Revised Code §5739.01 et seq. by adding Revised Code §§5739.101 through 107 that operated in a non-uniform manner in that it vacated Ohio sales tax pre-emption on a limited basis in favor of special island taxing districts consisting of Ohio island municipalities not attached to the mainland by a bridge. It authorized them an option of enacting a sales tax to a limited amount of one and one-half percent. The Put-in-Bay Island Taxing District Authority exercised it's option thereunder and elected to adopt a sales tax.

Colonial, Inc., a privately held corporation, as a taxpayer refused to pay the tax, claiming that the sales tax stemmed from a law of a general nature and did not

operate uniformly throughout the state and was, therefore, unconstitutional.

Put-In-Bay contended that while O.R.C. §5739.101 through 107 operated uniformly on all islands in the state and thus, met the constitutional requirement of uniformity. Further, it contended that these sections constituted a limited vacation of the State of Ohio's pre-emptive right in favor of a special island taxing district that essentially removed a judicial impediment to the island municipalities' existing right to levy a sales tax and, therefore, these statutes were not a law of general nature requiring uniformity.

Put-In-Bay further maintained that these sections provided both the equivalent and the purpose of uniformity that is rooted in the concept of equality and that this concept of equality, in a constitutional

sense, was met through the equal protection of the laws in that Ohio legislature's classification, with respect to the vacating of its pre-emption on a limited basis to the island municipalities was a reasonable classification.

The Common Pleas Court and the Court of Appeals upheld the constitutionality of Ohio Revised Code §5739.101-107. The Ohio Supreme Court reversed holding that these sections were unconstitutional in a decision reported 65 Ohio St3d 449 on December 11 1992.

REASONS FOR GRANTING THE WRIT

1. It Is Unreasonable For A Limited Vacation Of A Pre-Emption By A State Legislature To Be Judicially Construed As A Law Of A General Nature Requiring Uniformity.

There is no question that Ohio Revised Code §§5739.101-107 is part of the Ohio Sales Tax Act, §5739.01 et seq., that is a law of a general nature. Nonetheless, these O.R.C. §§5739.101-107 function and purpose is to remove a judicially implied pre-emption that has precluded municipalities from continuing to levy a sales tax which they are otherwise constitutionally authorized to do.

Ohio Revised Code §§5739.101-107 do not enact a tax. They authorize only certain island municipalities, formed into a special taxing district, to adopt a sales tax of a limited nature. Under these circumstances, the State of Ohio has not enacted a tax by these sections and, therefore, those

sections are not in the realm of a law of a general nature in that sense.

The pre-emption doctrine itself is not a tax but a judicial concept and, therefore, does not come within the ambit of the Ohio Constitution of a law of a general nature requiring uniformity. A limited vacation of a pre-emption in favor of island municipal taxing districts is constitutionally proper if it meets a reasonable classification test for equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

2. The Fourteenth Amendment To The United States Constitution Should Afford Equal Protection Of The Laws To The Island Municipalities Against Judicial Impediments To Collection of Their Duly Enacted Sales Tax, Sanctioned By Both The Ohio Constitution And It's Legislature.

This court has recognized municipalities as persons in civil rights

cases. This court is now being asked to regard municipalities, formed into an island taxing district, a person for the purposes of the equal protection clause of the Fourteenth Amendment so they can meet their governmental obligations to their citizens and residents. They have special needs because they are not connected to the mainland of the State of Ohio by a bridge.

The Ohio legislature recognized these special needs and vacated its sales tax pre-emption to a limited degree authorizing the island taxing districts to enact a limited sales tax to meet these needs.

It is fundamentally important that state legislatures be permitted to legislate for the special needs of various political subdivisions in their state and to make reasonable classifications when necessary as they have done here.

CONCLUSION

Petitioner urges this court to grant it's Petition for Writ of Certiorari to review the decision of the Supreme Court of Ohio.

Respectfully submitted,

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Suite 650, 75 Public Square Building
Cleveland, Ohio 44113
(216) 241-5115

Counsel for Petitioner

APPENDIX

IN THE COURT OF APPEALS OF OTTAWA COUNTY

Put-In-Bay Taxing Appellee,

v.

Eugene Niese and Colonial, Inc.

Appellants.

Court of Appeals No. 90-OT-024

Trial Court No. 89-CI-013

DECISION AND JOURNAL ENTRY

Decided:August 16 1991

* * * * *

Stewart I Mandel, for appellee.

T.Scott Johnson and Terrell Allen, for appellants.

* * * * *

This is an appeal from a judgment of the Ottawa County Court of Common Pleas in which the court granted the motion for summary judgment of appellee, Put-In-Bay Island Taxing District Authority. Appellants, Colonial, Inc., has filed a notice of appeal asserting the following assignments of error:

"ASSIGNMENT OF ERROR 1

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR APPELLEE BASED ON A FINDING THAT OHIO REV. CODE §§5739.010-107 IS CONSTITUTIONAL BECAUSE SUCH STATUTE IS A LAW OF A GENERAL NATURE THAT IS NOT UNIFORMLY APPLIED THROUGHOUT THE STATE AS REQUIRED BY ARTICLE II, SECTION 26 OF THE OHIO CONSTITUTION.

"ASSIGNMENT OF ERROR 2

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT FOR APPELLEE BASED ON A FINDING THAT OHIO REV. CODE §§5739.101-107 IS CONSTITUTIONAL BECAUSE AS APPLIED TO APPELLANT COLONIAL, INC. THE STATUTE VIOLATES ARTICLE XII, SECTION 3 OF THE OHIO CONSTITUTION AND ARTICLE VI, CL. 2 OF THE UNITED STATES CONSTITUTION.

The facts relevant to the issues raised in this appeal were the subject of a stipulation of facts entered into by the parties in the trial court. Included in the stipulation were the following:

"1. The Ohio legislature enacted Ohio Revised Code §§5739.101-107 effective June 1 1983 for the purpose of authorizing the imposition of an excise tax to raise revenue for the general funds of townships and municipal corporation in Island Taxing Districts.

"2. Ohio Revised Code §§5739.101-107 apply only to Island in Ohio as that term is defined in §5739.101.

"3. On March 10, 1984 the Council of the Village of Put-In-Bay adopted Ordinance No. 470. A true and accurate copy of Ordinance No. 470 is attached hereto as Exhibit A.

"4. On March 26, 1984, the Put-In-Bay

Taxing Authority adopted Resolution No. 84-2. A true and accurate copy of Resolution No. 84-2 is attached hereto as Exhibit B.

"5. Put-In-Bay Resolution No. 84-2 was enacted pursuant to and for the purposes set forth in Ohio Revised Code §5739.101.

"6. Taxes collected pursuant to Ohio Revised Code §5739.101-107 and Put-In-Bay Resolution No. 84-2 are deposited in the general fund of either the Village or Township of Put-In-Bay and thereafter expended by voucher according to law.

"7. Colonial Inc. was an Ohio corporation for all tax years in question in this action.

"8. Eugene Niese is a shareholder of Colonial Inc. for all tax years in question in this action.

"9. Colonial Inc. held only one Ohio vendor's license for the following businesses: Island General Store, Beer Barrel Restaurant,

Beer Barrel Saloon, Colonial Department Store, and Papa Tippers Restaurant (n/k/a Tippers Restaurant) for all tax years in question in this action.

"10. Colonial Inc is an authorized food stamp vendor and accepts food stamps for payment at the Island General Store.

"11. Colonial Inc. sells food for human consumption off the premises where it is sold.

"12. Colonial Inc. filed sales tax returns with the Ohio Department of Taxation and paid the Ohio state and county sales tax applicable to sales made by the above-named businesses for the period from May 1 1984 through October 31 1987.

"13. Colonial Inc. is the only party to this action that has made sales in the Put-In-Bay Island Taxing District for purposes of this suit.

"14. Colonial Inc. did not file a return with the Ottawa County treasurer for purposes

of the Island District Excise Tax for the period form Jay 1, 1984 through October 31, 1987.

"***

"17. The Island District Excise tax should not apply to sales of food for human consumption off the premises where sold. Colonial Inc is entitled to an exemption for all such sales for all years in question. For purposes of calculating the amount set forth in paragraph 19, the parties have given Colonial Inc. the benefit of this exemption.

"18. The Island District Excise Tax should not apply to food stamp purchases. Colonial Inc. is entitled to an exemption for all food stamp sales for all years in question. For purposes of calculating the amount set forth in paragraph 19, the parties have given Colonial Inc. the benefit of this exemption, in accordance with federal law.

"19. If the Court finds that the Island

District Excise Tax is constitutional, taxes in the amount of $20,492.29 plus statutory interest in accordance with law are due and owing from Colonial Inc for the period from May 1, 1984 through October 31, 1987."

In its assignments of error, Colonial, Inc. asserts that the trial court erred in granting appellee's motion for summary judgment on the ground that R.C. 5739.101-107 is constitutional. Appellant contends that the statute is unconstitutional because it is a law of general nature that is not uniformly applied throughout the state and that it is unconstitutional as applied to appellant.

After a thorough review of appellant's arguments on these issues, the relevant statute, and standard set forth in State, ex rel. Zupancic v. Limbach (1991), 58 Ohio St. 3d 130, 138-139, for analyzing these issues, we conclude that the trial court did not err in finding R.C. 5739.101-107 constitutionally

sound. As the court in Zupancic stated:

> "*** the General Assembly may recognize existing conditions and enact statutes which are deemed uniform for dealing with those unequal conditions in a rational way rather than attempt to compel their application to conditions where they could have no possible effect." Id. at 138, citing State, ex rel Stanton v. Powell (1924), 109 Ohio St. 383, 385-386.

In the present case, it is clear that islands have unequal conditions that the statute seeks to deal with in a rational manner. To hold otherwise would defeat a legitimate governmental purpose and responsibility. We hereby affirm and adopt the trial court's judgment on these issues as our own. See Appendix A.

Accordingly, appellant's first and second

assignments of error are found not well-taken.

On consideration whereof, this court finds that substantial justice has been done the party complaining, and the judgment of the Ottawa County Court of Common Pleas is affirmed. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See, also, Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J. _____
PRESIDING JUDGE

George M. Glasser, J. _____
CONCUR. JUDGE

James R. Sherck: J., dissents.

SHERCK, J. I respectfully dissent. The majority in adopting the opinion of the trial court has overlooked what is, in my opinion, a fatal flaw in that opinion. This flaw is in the trial court's discussion of what is and

what is not a "law of a general nature." It is unquestioned that unless a law is of a general nature, it is unconstitutional under Section 26, Article II of the Ohio Constitution.

> The trial court in its opinion stated: "Island is defined in Sec. 5739.01 R.C. as: 'An island that is not connected to the mainland by a highwayor a bridge.' Certainly this law is of a general nature to be applied to any island in the State not connected by a bridge or highway to the mainland"

This is not the test used in Ohio to distinguish between a law of general nature and one of local or special nature.

In Hixson v. Burson (1896), 54 Ohio St. 470, the Supreme Court of Ohio discussed the difference between general and local or special statutes:

"***[E]very subject of legislation is either of a general nature on the one hand, or local or special on the other. It cannot be in its nature both general and special, because the two are inconsistent. If it is of a general nature, the constitution requires that all laws--not some laws-on that subject shall have a uniform operation throughout the state.

"But how are we to determine whether a given subject is of a general nature? One way is this: if the subject does or may exist in, and affect the people of, every county, in the state, it is of a general nature. On the contrary, if the subject cannot exist in, or affect the people of every county, it is local or special. A subject matter of such general nature can be regulated and legislated upon by

> general laws having uniform operation throughout the state, and a subject matter which cannot exist in, or affect the people of every county, cannot be regulated by general laws having a uniform operation throughout the state, because a law cannot operate where there can be no subject matter to be operated upon." Id. at 481."

The distinction between general and special legislation outlined in Hixson was recently quoted with approval by the Supreme Court of Ohio in Zupancic v. Limbach (1991), 58 Ohio St 3d 130, 137-138.

In applying the Hixson distinction in the instant case, it is clear that the subject of R.C. 5739.101 to 107, islands not connected to the mainland by a highway or bridge, does not exist in, nor can it ever exist in, and affect the people of, every county in the state. By

its geographic definition the statute applies only to a micro portion of the state's territory. In reality and for all practical purposes, R.C. 5739.101 to 5739.107 apply only to the Lake Erie island that are located in Ottawa and Erie counties. They are the only two counties that have islands that contain communities with local retail establishments. In upholding tax district legislation in Zupancic, supra, the Supreme Court of Ohio recognized the possibility that billion dollar power plants could be built at some future date in any Ohio county and that legislation would then apply to those plants. Arguably, it is possible that another island or two may be developed in some other Ohio county at some future date. However, absent a return of the glacier, there is no possibility that such islands could ever exist in every county of the state.

Therefore, because I believe that R.C. 5739.101 to 5739.107 are not laws of a general nature as required by Section 26, Article II of the Ohio Constitution, I would hold the statute to be unconstitutional and reverse the judgment of the trial court.

APPENDIX A

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,	Case No. 89-CI-13
Plaintiff,	DECISION ON MOTION FOR SUMMARY JUDGMENT
EUGENE NIESE, ET AL.,	
Defendants.	

Plaintiff's and defendant's motion for summary judgment on plaintiff's complaint came on for decision on the pleadings, affidavit,

depositions, stipulations, and memorandum filed, oral argument being waived.

The undisputed facts show that on May 1, 1984, pursuant to §5739.101 et seq., the plaintiff adopted an excise tax of 1/2 percent on all business including sales on Put-In-Bay Island Taxing District Authority. This action was filed by plaintiff Taxing District Authority against defendants Eugene Niese and Colonial, Inc., alleging that they did business of making sales within the taxing district between May 1, 1984 and October 31, 1987 and did not file returns or pay any taxes, and demanding judgment for such amounts as were found owing.

Defendant Eugene Niese is a shareholder and officer of Colonial Inc. Colonial, Inc. operates a grocery store, restaurant, bar, and at one time a general store in the taxing district during the time involved in this suit.

The businesses operated by Colonial, Inc. sell some food for human consumption off the premises and are authorized to accept food stamps.

The basis of defendants motion for summary judgment are as follows:

1. Ohio Revised Code §§5739.101-107, and the resolution adopted thereunder are unconstitutional because they are laws of a general nature that do not operate uniformly throughout the state.

2. Ohio Revised Code §§5739.101-107 are unconstitutional because they authorize the imposition of a tax on all sales without excluding either food for off-premises consumption or items lawfully purchased with food stamps.

3. Eugene Niese is Entitled to Judgment in his favor because he is

not subject to the Island District Excise Tax.

If the defendant fails on both 1 and 2 above then in the absence of any unargued grounds, plaintiff must prevail in its motion for summary judgment except possibly as the laws applies to Niese.

Therefore we must first look to the first grounds for summary judgment advanced by defendant. It is founded on the provisions of Article 11 Sec. 26 of the Ohio Constitution which reads as follows:

> All law, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the general assembly, except, as otherwise provided in the constitution.

In deciding the constitutionality of the Island excise tax, the Court must start by applying a presumption that the legislation is constitutional. Okey v Wation 36 Ohio App 2nd 87 (1973); State ex rel Prospect Hospital v Ferguson 133 Ohio St 325 (1938); and Richmond Heights v LoConti 19 Ohio App 2nd 100 (1969) at page 113.

The excise tax provided for an option of the taxing district applies only to Island Taxing Authority. Island is defined in §5739.01 as: "an island that is not connected to the mainland by a highway or a bridge". Certainly this law is of a general nature to be applied to any island in the state not connected by a bridge or highway to the mainland. There is no question the constitutional provision cited applies to this statute. However, the question posed herein is as there are so few such islands within the State does this fact render it in violation of

violation of the constitutional provision.

Looking at a map we find the islands in Lake Erie within Ottawa County, Kellys Island in Erie County nd western islands in Lucas County. Also, the Court is not clear as to at least Blennerhasset Island in the Ohio River and whether the law could possibly apply to it as well.

Regardless, the law does apply uniformly throughout the States and meets the test of Platt v Craig, Daly, James in 66 Ohio St 75 (1902) on page 79 where the Court stated:

> Not only must sch [sic] laws operate throughout the state, but they must operate uniformly, that is, there must be no exemptions as to the individuals of the same class. A general law must, therefore, in its operation be co-extensive with the state and co-extensive with every class brought within the purview of the statute; but

> this section does not imply that a law of a general nature must necessarily affect every individual in the state, or every small subdivision of territory within the state.

The Court therefore finds that said provisions of the Ohio Revised Code are constitutionally valid.

The next issue raised by defendant is that said provisions are unconstitutional as applied to defendant. The basis lies in the fact that as a vendor defendant does sell food for consumption off the premises and is authorized to accept food stamps. The provisions of §5739.101 R.C. et seq do not expressly except these sales from its application.

It is to be noted that the parties have stipulated as to both of these items being excluded form any computation of what tax is owing. This does not, however, answer the

question of constitutionality.

Article 12 Sec. 3 of the Ohio Constitution specifically prohibits the levy of excise taxes on the seller or purchaser of foods for human consumption off the premises. Sec. 7 C.F.R. 272.1(b) prohibits States from collecting state or local taxes on purchases made with food stamps. In the general provisions of Chapter 5739, and more specifically §5739.02(B)(2) exempts from excise tax food sold for human consumption away from the premises and Paragraph (B)(37) foods purchased with food stamps.

The issue then becomes does the failure of the legislature to specifically incorporate into that portion of Chapter 5739 that applies to Island Taxing Authority excise taxes (Sec. 5339.101 R.C. et seq.) make said Sections unconstitutional as applied to defendant. That it was the intention of the legislature that Chapter 5739 provide a uniform

application as to what was to be taxed throughout the Chapter is shown by presumption set up in the last paragraph of 5739.02(B) which reads:

> "For purposes of the proper administration of sections 5739.01 to 5739.31 of the Revised Code, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established."

It is to be noted that Sections 5739.101-107 et seq fall within the statues covered by this presumption.

The Court therefore holds that these Sections must all be read in paria materia and so construed to accomplish the legislative intent. Roberts v Briscoe 44 Ohio ST 59 (1888).

Accordingly, the Court finds these statues constitutional as applied to the

defendant.

The third issue raised in these motions is as to the secondary liability of defendant Eugene Niese. The plaintiffs founds its claim of his individual liability on Sec. 5739.33 R.C. which reads:

> "If any corporation or business trust required to file returns and to remit tax due to the state under the provisions of this chapter fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers or trustees who are responsible for the execution of the corporation's or business trust's fiscal responsibilities, shall be personally liable for the failure.

The applicable stipulation entered into

by the parties is stipulation of which reads: "Eugene Niese is a shareholder of Colonial, Inc. for all tax years in question in this action."

The deposition of Eugene Niese shows that he was the general manager, president, member of the board of directors of Colonial, Inc. Further it shows that he made the decision not to file the sales tax returns and pay the tax on behalf of the corporation as he believed the tax to be unconstitutional. Clearly this places him individually within the purview of §5739.33 R.C.

However, the claim against defendant Eugene Niese is premature. His liability does not yet arise and therefore the Court must deny plailntiffs motion as to him.

The Courts finds there are no genuine issues as to any material facts except the computation of interest and that plaintiff is entitled to judgment in the principal amount

as stipulated as to Colonial, Inc. as a matter of law. Judgment shall be so entered for plaintiff and if a hearing is necessary to decide the correct computation of interest, the parties shall so move for the scheduling of said hearing.

The Court further finds that there is no genuine [sic] as to any material fact and defendant, Eugene Niese is entitled to judgment of dismissal as matter of law as the claim against him is premature at this time.

Plaintiffs counsel shall prepare a judgment entry in accordance with this decision, submit same to defendants counsel for approval and file same with the Court within 20 days of receipt of a copy of this decision or account to the Court on failure to do so.

James E Thierry
JUDGE

IN THE COURT OF COMMON PLEAS
OF OTTAWA COUNTY, OHIO

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,	]	Case No. 89-CI-13
Plaintiff,	]	
-vs-	]	
EUGENE NIESE, et al.	]	JUDGMENT ENTRY
Defendants.	]	

The Court having rendered a decision filed April 6 1990, which is incorporated herein by reference, and the Court having found in favor of Plaintiff Put-In-Bay Island Taxing District Authority on its motion for summary judgment and against Defendant Colonial, Inc. and the parties having stipulated:

(a) To the amount of unpaid taxes as $20,492.29;

(b) To the amount of interest due and owing on the unpaid taxes of $6,500.00 as of December 31 1989;

and

(c) An additional amount due and owing as interest of $796.67 from January 1, 1990 through May 10, 1990.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff Put-In-Bay Island Taxing District Authority have and recover from Defendant Colonial Inc., judgment in the sum of $27,788.96, with interest thereon at the statutory rate from the 10th day of May, 1990, notwithstanding the date this Judgment Entry is journalized.

IT IS FURTHER ORDERED that Defendant Eugene Niese is dismissed without prejudice as a party defendant, and costs are to be assessed pursuant to Rule 54(D) of the Ohio Rules of Civil Procedure.

IT IS SO ORDERED this __ day of _____ 1990.

James E Thierry
JUDGE

Approved as to form:

Stewart I Mandel
STEWART I MANDEL
Attorney for Plaintiff

T. Scott Johnston telephonic consent
T. SCOTT JOHNSTON
Attorney for Defendants

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,

APPELLEE, v. COLONIAL, INC. APPELLANT

[Cite as **Put-In-Bay Island Taxing Dist. Auth. v. Colonial, Inc. (1992), 65 Ohio St.3d 449**]

Taxation-Island taxing districts-R.C.5739.101 et seq. violates Section 26, Article II of the Ohio Constitution.

R.C. 5739.101 et seq violates Section 26, Article II of the Ohio Constitution.

See: West's Ohio Digest, Licenses Key 7(5).

(No.91-2064-Submitted November 9 1992 Decided December 11, 1992.)

Appeal from the Court of Appeals for Ottawa County, No. 90-OT-024.

Effective June 1, 1983 the General Assembly enacted R.C. 5739.101 through

5739.107 for the purpose of authorizing the imposition of an excise tax on vendors engaged in the business of making sales on "Islands" in Ohio. These sections were added to R.C. Chapter 5739, governing sales tax in Ohio.

In March 1984, the Council of the village of Put-In-Bay, pursuant to R.C. 5739.101, affirmed the establishment of the Put-In-Bay Island Taxing District and appointed members to appellee, Put-In-Bay Taxing District Authority. Thereafter, pursuant to R.C. 5739.101(C) appellee adopted a resolution imposing a one-half percent tax on all businesses conducting sales within the taxing district. The resolution became effective May 1 1984.

On January 18 1989, appellee filed a complaint against appellant, Colonial, Inc. ("Colonial"), and its president, seeking to recover the one-half percent tax imposed for the period from May 1 1984 through October 31

1987. Appellee also sought to recover interest on the accumulated unpaid tax. Colonial responded to appellee's complaint by filing an answer which challenged the constitutionality of the tax. Colonial contended, among other arguments, that R.C. 5739.101 **et seq** violated Section 26, Article II of the Ohio Constitution.[1]

---

1. The record indicates that Colonial held an Ohio vendor's license, operating a general store, a department store, two restaurants and a bar. Further, Colonial filed sales tax returns and paid applicable state and county sales taxes, but did not pay the island district excise tax during the period of time in question.

The parties stipulated to the material facts and submitted cross-motions for summary judgment. On April 6, 1990, the trial court granted summary judgment in favor of appellee, concluding, **inter alia**, that R.C. 5739.101 **et seq.** as constitutional in all respects. Subsequently, in a journal entry dated May 17, 1990, the trial court assessed the amount of tax and interest owed by Colonial to appellee.

Upon appeal by Colonial, the court of appeals, in a divided vote, relying on **State ex rel Zupancic v. Limbach** (1991) 58 Ohio St3d 130, N.E.2D 1206, affirmed the judgment of the trial court. The court concluded that R.C. 5739.101 **et seq.** was constitutional because "*** islands have unequal conditions that the statute seeks to deal with in a rational manner."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Stewart I. Mandel, for appellee.

Cooper, Straub, Walinski & Cramer, L.P.A., T.

Scott Johnston, Margaret J Lockhart and **Terrell A Allen**, for appellant.

DOUGLAS, J. The issue in this case is whether R.C. 5739.101 **et seq.** is at odds with Section 26, Article II of the Ohio Constitution. For the reasons that follow, we find that R.C. 5739.101 **et seq** contravenes Section 26, Article II.

R.C. 5739.101 establishes each island in Ohio " *** as a special taxing district solely for the purpose of imposing tax authorized by this section *** to raise revenue for the general funds of the townships and municipal corporations whose boundaries include such island territory." "Island," as used in R.C. 5739.101 **et seq.** "*** means an island that is not connected to the mainland by a highway or a bridge." R.C. 5739.101. In addition, R.C. 5739.101 provides that "[t]he taxing authority of an island taxing district may, by resolution[,] *** impose or repeal a tax on the privilege of engaging in the business of making sales on the island[,] *** [which] rate

of the tax shall be one-half, one, or one and one-half percent of the receipts derived from all such sales ***." Further, the taxes authorized by the legislation are imposed upon vendors, not consumers. **Id.** All revenues received by a township or municipal corporation must be deposited in its general fund. R.C. 5739.102.

Section 26, Article II requires that "[a]ll laws, of a general nature, **shall have a uniform operation throughout the state** ***." (Emphasis added.) Section 26, ARrticle II applies to all subjects except those explicitly and exclusively provided for by other sections of the Constitution. See Mallison, General Versus Special Statutes in Ohio (1950), 11 Ohio St.L.J. 462, at 463-464. Further, it is well settled that this section of the Constitution is mandatory and not merely directory. See **State ex rel. Wirsch v. Spellmire** (1902), 67 Ohio St. 77, 65 N.E.619. In addition, this court has observed that " *** uniform operation throughout the state'

means universal operation as to territory, it takes in the whole state. And, **as to persons and things, it means universal operation as to all persons and things in the same condition or category.** When a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state." (Emphasis added.) **Id.** at 86, 65 N.E.at 622.

In **State ex rel. Dayton Fraternal Order of Police Lodge No. 44 v. State Emp. Relations Bd.** (1986), 22 Ohio St.3d 1, 22 OBR 1, 488 N.E.2d 181, paragraph one of the syllabus, we held that R.C. Chapter 4117, Ohio's Public Employees' Collective Bargaining Act, is a law of a general nature. We further determined that a provision in the law which operated to exclude selected city of Dayton police officers and fire fighters from the Act (Dayton Amendment) was unconstitutional.

Specifically, in **Lodge No. 44**, we held that the "Dayton Amendment" violated Section 26, Article II, in that it did not have

"uniform" operation throughout the state, as the term is used in the Constitution, because " *** the provision does not affect any employees in the state except those specific policemen and fire fighters *** who have previously been determined to be 'supervisors.' In its clearest sense, the provision involved bears every evidence of special legislation affecting, to their detriment, only one group of employees while granting to all other employees in the state, likely situated, the full protection and rights afforded by the Act." **Id.** at 5-6, 22 OBR at 5, 488 N.E.2d at 185.

In our recent **Zupancic** decision, we were asked to determine whether a statute which classified taxing districts on the basis of the costs of an electrical power plant complied with Section 26, Article II. The precise issue was whether the statute operated uniformly throughout the state.

In **Zupancic**, we noted that this court has historically viewed tax statues to be of a

general nature, and that such statues must operate in a uniform manner. **Id.** 58 Ohio St.3d at 138, 568 N.E.2d 1213. We further reviewed criteria for determining whether a statute operates uniformly, citing **State ex rel. Stanton v. Powell** (1924), 109 Ohio St. 383, 142 N.E. 401, and held that even though the statute in question applied to only one particular electric power plant, it operated in uniform manner throughout the state. **Zupancic,** 58 Ohio St.3d at 138, 568 N.E.2d at 1214.

In reaching this conclusion, we reasoned that the statute operated in a uniform manner within the meaning of Section 26, Article II because it had the potential to apply to any county in the state, and that " *** there is nothing within the Act itself to prevent its prospective operation upon any electric power plant similarly situated through the state." **Id.** at 138, 568 N.E.2d at 1213. We then stated that the substance of the statutory classification was reasonable and achieved a

legitimate governmental purpose, operating equally on all persons or entities included within its provisions. **Id.** at 138-139, 568 N.E.2d at 1213-1214.

In the case at bar, the parties appear to agree that R.C. 5739.101 **et seq.** is a law of a general nature. Hence, the question becomes whether the legislation operates in a uniform manner throughout the state.

R.C. 5739.101 **et seq.** specifically targets a limited geographical class of vendors, i.e., those vendors engaged in making sales within an island taxing district. Thus, this statutory scheme applies only to a territorially limited class of vendors in Ohio. The statute does not apply to all Ohio vendors. As such, R.C. 5739.101 **et seq.**, without question, carries with it every indicia of special legislation, imposing burdens upon particular vendors in a limited geographical setting while, by application, excepting all other vendors in the state. Further, the statute here, unlike the statute

at issue in **Zupancic**, does not have the potential to apply throughout the state.

Accordingly, based on the foregoing, we believe that R.C. 5739.101 **et seq.** does not operate in a uniform manner through the state. Therefore, we hold that R.C. 5739.101 **et seq.** violates Section 26, Article II of the Ohio Constitution.

We further believe that today's holding is also consistent with prior decisions from this court. See, **e.g., Hixson v. Burson** (1896), 54 Ohio St. 470, 43 N.E. 1000; **Silberman v. Hay** (1899), 59 Ohio St. 582, 53 N.E. 258; **Platt v. Craig** (1902), 66 Ohio St. 75, 63 N.E. 594; **Andrews v. State ex rel. Henry** (1922), 104 Ohio St. 384, 135 N.E. 655; and **Brown v. State ex rel. Merland** (1929), 120 Ohio St. 297, 166 N.E. 214.

Accordingly, the judgment of the court of appeals is reversed.

Judgment reversed.

Moyer, C.J., Sweeney, Holmes, Wright, H.Brown and Resnick, JJ., concur.

STATUTES INVOLVED

[§5739.101] §5739.101 Island taxing districts established; members of taxing authority; resolution imposing tax.

As used in this section "island" means an island that is not connected to the mainland by highway or a bridge. If an island is a part of a township that consists solely of island, "island" means all of such islands.

The territory of each island is hereby established as a special taxing district solely for the purpose of imposing tax authorized by this section and section 5727.83 of the Revised Code to raise revenue for the generally funds of the townships and municipal corporations whose boundaries include such island territory.

The taxing authority of an island taxing district shall be as follows:

(A) The members of the board of township trustees of each township that contains any of the island's territory;

(B) Three members of the legislative authority of each municipal corporation that contains any of the island's territory, to be appointed by a majority vote of the members of that legislative authority;

(C) If the number of members of the taxing authority serving under divisions (A) and (B) of this section is an even number, one member appointed by a majority vote of the members serving under divisions (A) and (B) of this section to serve at the pleasure of such members.

The taxing authority of an island taxing district may, by resolution adopted by majority of the members thereof, impose or repeal a tax upon the privilege of engaging in the business of making sales on the island. The rate of the tax shall be one-half, one, or one and one-half per cent of the receipts derived from all such sales except sales of water transportation company included in the gross receipts certified by the tax commissioner pursuant to Section 5727.36 of

the Revised Code. A copy of any such resolution shall be certified within five days of its adoption to the tax commissioner and the treasurer of the county within which the district is located. The tax shall take effect on the first day of the month that occurs at least thirty days following the adoption of the resolution imposing the tax. The tax shall be imposed upon the vendor and shall be collected in the manner prescribed by Section 5739.102[5739.10.2] of the Revised Code.

[§5739.10.2] §5739.102 Vendor to file return; interest; verification by tax commissioner; distribution of receipts.

As used in this section:

(A) "Treasurer" means the treasurer of the county within which an island taxing district is located.

(B) "Vendor" means a vendor that is subject to a tax imposed by an island taxing district under section 5739.101 [5739.10.1] of

the Revised Code.

Each vendor shall make and file a return with the county treasurer showing the vendor's receipts from sales on the island taxing district during the preceding six months or the preceding twelve months. The period covered by the return shall be determined by the treasurer. The return shall be in such form as the treasurer requires, and it shall be submitted, along with payment of the tax due, as measured by sales during the period covered by the return, on or before the last day of the month following the last month of the period covered by the return. When a return is for a period during which the tax is not in effect for the entire period, the vendor shall apportion the sales among the months covered by the return to enable the treasurer to correctly determine the proper amount of tax due for the period covered by the return. The apportionment shall be made in such form as the treasurer directs.

If the full amount of the tax due is not

paid by the date due, interest shall be charged on the unpaid balance at the rate per annum prescribed by section 5703.47 of the Revised Code from the date prescribed for its payment until it is paid. If with respect to any return filed with the treasurer under this section the vendor subsequently determines the receipts from sales reported on the return do not correctly reflect the vendor's tax liability for the period covered by the return, he shall report to the treasurer at the time the next return is required to be filed under this section, the amount by which such determination resulted in an overpayment or underpayment of the vendor's tax for the period covered by the return, and such amount shall be added to or deducted from the tax due at the time such next return is required to be filed.

Upon the request of a treasurer, the tax commissioner shall furnish the treasurer with a verification of any information that is information required to be reported by the

vendor under section 5739.12 of the Revised Code.

On the fifteen day of each month, the treasurer, based upon the information included in the reports made to him, shall distribute all payments of an island taxing district's tax and any interest thereon received under this section in the preceding month among the municipal corporations and townships of which the district is a part. Each township shall receive the same per cent of the amount to be distributed as the proportion of such amount that arises form receipts derived from sales within the unincorporated portion of the township bears to such amount that arises from all sales in the district. Each municipal corporation shall receive the same per cent of the amount to be distributed as the proportion of such amount that arises from receipts derived from sales within the municipal corporation bears to such amount that arises form all sales in the district. Revenues received by a township or municipal

corporation under this section shall be deposited in its general fund.

[§5739.10.3] §5739.103 Prohibitions.

No person shall fail to file a return or knowingly fail to report any information required to be filed or reported by section 5739.102 [5739.10.2] of the Revised Code.

[§5739.10.4] §5739.104 Inspection of vendor's records; examination of agents.

To carry out the purposes of sections 5739.101[5739.10.1] to 5739.107[5739.10.7] of the Revised Code, he is required to administer, the treasurer any person employed by him for that purpose may, upon demand, inspect books, accounts, records, and memoranda of any vendor subject to such laws, and examine under oath any officer, agent, or employee of any such vendor. Any person other than the treasure who makes such demand shall produce his authority to make such inspection.

[§5739.10.5] §5739.105 Order or subpoena for production of records.

The treasurer may require, by order or subpoena served on any vendor in the same manner that a summons is served in a civil action in the court of common pleas, the production within the county, at such time and place as the treasurer designates, of any books, accounts, papers, or records kept by such vendor in any office or place within or without the state, or verified copies in lieu thereof if the treasurer so orders, so that the examination thereof may be made by the treasurer.

No such vendor shall fail to comply with any such order or subpoena; for each day it so fails it shall pay into the county treasury a sum of not less than fifty nor more than five hundred dollars.

[§5739.10.6] §5739.106 Action to recover unpaid taxes and interest.

The taxes and interest provided by

sections 5739.101 [5739.10.1] and 5739.102 [5739.10.2] of the Revised Code may be recovered by an action brought in the name of the island taxing district in the court of common pleas of the county whose treasurer is required to collect the tax, and such court of common pleas shall have jurisdiction of such action regardless of the amount involved. The prosecuting attorney, on request of the county treasurer, shall institute such action. In any such action it shall be sufficient to allege that the tax or interest sought to be recovered stands due and unpaid, and that the same has been unpaid for a period of thirty days after the last date by which it could be paid without interest. Sums recovered in any such action shall be distributed by the treasurer in the manner prescribed by section 5739.101 [5739.10.2] of the Revised Code.

[§5739.10.7] §5739.107 Confidentiality of information.

Any information gained as a result of returns, copies of documents filed, payments made, investigations, hearings or verifications made under sections 5739.102 [5739.10.2] to 5739.106 [5739.10.6] of the Revised Code is confidential, and no person shall disclose such information, except for official purposes or in accordance with a proper judicial order. This section does not prohibit the publication of statistics in a form which does not disclose information with respect to individual taxpayers.

No. 92-1499

IN THE

Supreme Court of the United States

October Term, 1992

PUT-IN-BAY ISLAND TAXING
DISTRICT AUTHORITY,
Petitioner,

vs.

COLONIAL, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

There is no parent or subsidiary company to be listed.

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I. STATEMENT OF THE CASE

Petitioner seeks review of the Ohio Supreme Court's decision in *Put-in-Bay Island Taxing District Authority v. Colonial, Inc.*, 65 Ohio St. 3d 449 (1992), rendered on December 11, 1992. In that case the Ohio Supreme Court decided that Ohio Revised Code §5739.101-109 (hereinafter the "island district excise tax statute" or "statute") violated Article II, §26 of the Ohio Constitution. This provision of the Ohio Constitution requires that laws of a general nature operate uniformly throughout the state.

The island district excise tax statute was state legislation that granted only a few select Ohio municipalities, those contained on islands without bridges, the privilege of imposing an excise tax on vendors. The Ohio Supreme Court held that the statute was unconstitutional because it was a law of a general nature that did not operate uniformly throughout the state in contravention of Article II, §26 of the Ohio Constitution.

The Ohio Supreme Court's decision was based solely on state constitutional grounds. The petitioner never presented any federal question at any stage of the state court proceedings and no federal question was decided by the Ohio Supreme Court.

II. SUMMARY OF REASONS FOR DENYING THE WRIT

There is no jurisdictional basis for granting a writ of certiorari. The decision petitioner seeks to have reviewed is a *state* court decision holding a *state* statute unconstitutional under the *state* constitution. The petitioner never presented a federal question to the state court. Nor did the state court decide any federal question or rest its decision on any federal ground. Furthermore, petitioner fails to present any legitimate federal question in this petition. The petition for writ of certiorari has no merit and should be denied.

III. REASONS FOR DENYING THE WRIT

A. The United States Supreme Court Lacks Jurisdiction to Review the Ohio Supreme Court's Decision in This Case.

There are no facts in this case to support a finding of U.S. Supreme Court jurisdiction. The U.S. Supreme Court does not have the power to review a state court decision that does not involve a federal question. *See* 28 U.S.C. §1257(a).[1] The issue presented to the Ohio Supreme Court was the validity of a state statute under the state constitution. The Ohio Supreme Court's decision rested solely on state constitutional grounds. State courts speak with finality on questions of state law. *See, e.g., Henry v. Mississippi,* 379 U.S. 443, 446-47 (1965); *Murdock v. City of Memphis,* 20 Wall. 590, 22 L. Ed. 429 (1875). This Court has no power to review the Ohio Supreme Court's decision in this case.

This Court also may not review federal questions that were not first presented to the state court whose decision is the subject of a petition for certiorari. *See, e.g., Webb v. Webb,* 451 U.S. 493, 495-97 (1981); 28 U.S.C. §1257(a). The petitioner presented no federal questions to the Ohio Supreme Court in this case and none were decided.

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[1] None of the statutes cited by petitioner in its statement regarding jurisdiction provide a basis for the assertion of jurisdiction in this case. Petitioner cites 28 U.S.C. §§1254(1), 1257, and 2101(c). Section 1254(1) involves only appeals from U.S. Courts of Appeal. Section 2101 does not provide a basis for jurisdiction but simply sets forth the time in which a petition for certiorari must be filed. Finally, Section 1257(a) provides only for the review of state court decisions involving federal questions.

Petitioner has also failed to comply with Supreme Court Rule 14(h) regarding petitions for review of state court decisions. This rule requires a petitioner seeking review of a state court decision to specify in his petition:

> the stage of the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised, the method and manner of raising them and the way in which they were passed upon by those courts and such pertinent quotations of specific portions of the record or summary . . . as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Petitioner has not provided the Court with any of this required information. That petitioner has failed to provide such information is not surprising since petitioner never presented *any* federal question at *any* stage of the state court proceedings.

For all of the above reasons, it is clear that this Court lacks jurisdiction to review this case.

B. Petitioner has Presented no Legitimate Federal Question to This Court.

Although petitioner phrases its "questions presented" in terms of federal equal protection issues, no such questions have ever been raised in this case. Nor is there any merit to the questions presented in the petition. Petitioner's attempt to fashion a federal claim out of a state constitutional question simply has no basis in either law or fact.

Petitioner essentially claims that its federal constitutional rights were violated by the Ohio Supreme Court's invalidation of a state statute on state constitutional grounds. Petitioner evidently claims that it has a federal constitutional right to special state legislation that is prohibited by the state constitution. This argument is ludicrous.

Petitioner cites no authority in support of its petition because there is none. No federal constitutional provision or federal law mandates the enactment of or sanctions the validity of the island district excise tax statute. The equal protection clause does not give island municipalities the right to a state law giving them local taxing privileges that other municipalities do not have. In fact, political subdivisions such as municipalities are not even "persons" entitled to equal protection under the 14th Amendment. *See, e.g., City of Newark v. New Jersey*, 262 U.S. 192, 196 (1923); *Williams v. Mayor*, 289 U.S. 36, 40 (1933); *South Macomb Disposal Authority v. Washington Twp.*, 790 F.2d 500, 505 (6th Cir. 1986).

The petition fails to present a meritorious federal question, much less one that has ever been raised before in this litigation. It is clear from petitioner's discussion of reasons for granting certiorari that petitioner is asking this Court to review the reasonableness of a state court's interpretation of its own constitution. This Court has no jurisdiction to do this.

IV. CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
APR 19 1993
OFFICE OF THE CLERK

NO. 92-1499

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

PUT-IN-BAY ISLAND TAXING DISTRICT AUTHORITY,
Petitioner,

vs.

COLONIAL, INC.
Respondent.

Petition for a Writ of Certiorari
To the Supreme Court of Ohio

PETITIONER'S REPLY BRIEF IN SUPPORT OF IT'S PETITION FOR WRIT OF CERTIORARI

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The Respondent, by relying on **Webb v Webb 451 U S 493**, apparently concedes Justice Powell and Justice Brennan's concurring opinion at page 501 of the opinion,

> "..... that this court has jurisdiction to review plain error unchallenged in state court when necessary to prevent fundamental unfairness."

Petitioner contends that this court has jurisdiction to review plain error that was unchallenged in the state court because of the fundamental unfairness of the Supreme Court of Ohio decision. Also, Petitioner has raised the federal constitutional question at it's earliest opportunity in this petition for a writ of certiorari; and the state courts below were afforded a fair opportunity to address the federal questions sought to be presented here, since in deciding Respondent's constitutional challenge on uniformity the courts below were implicitly and necessarily dealing with the legal concept of equal

protection of the laws that is clearly intertwined with the concept of uniformity.

It is plain error for the Supreme Court of Ohio to judicially construe a limited vacation of a state sales tax pre-emption in favor of certain island municipalities as a law of a general nature requiring uniformity and is fundamentally unfair find to those statutes unconstitutional.

The error is plain because both pre-emptions and the limited vacation of a sales tax pre-emption are basically judicial concepts and are not laws of a general nature requiring uniformity. It is fundamentally unfair because municipalities have the constitutional right and power to levy a sales tax except for the pre-emptive effect of the Ohio Sales Tax Act.

Further, the vacation of the sales tax pre-emption in favor of Ohio islands, not connected to the mainland by a bridge, is a

reasonable classification because of the special circumstances of those islands.

As stated in **Board of Health v. Greenville, 86 Ohio St.1**, at page 39 (1912):

> It has been repeatedly held by this court that where a law is available in every part of the state as to all persons and things in the same condition or category, it is of uniform operation throughout the state. **State, ex rel., v. Spellmire, 67 Ohio St. 77; Cincinnati v. Steinkamp, 54 Ohio St. 284; McGill v. State, 34 Ohio St., 228; State, ex rel., v. Bargus, 53 Ohio St. 94.**

It is obvious that the vacation of the pre-emption operates wherever there is an Ohio island not connected to the mainland by a bridge and the statues in question qualify under the definition of uniformity stated above, notwithstanding Petitioner's contention they are not legally required to be uniform.

The Ohio Supreme Court's judgments on the issue of uniformity under Article II Section 26 of the Ohio Constitution are

admittedly wholly irreconcilable. As stated in **Brown v. State, ex rel, 120 Ohio St.297**, at page 304 (1929) the court stated:

> The pronouncements of this court in the past have not always been consistent or harmonious. Without any change in the language of Section 26 of Article II, the changing personnel of this court and the changing conditions of human progress have brought fluctuations in decisions which must be accounted for partly on the theory of a different trend of thought and a different attitude toward local control of local conditions. It would be futile to attempt to reconcile all of them, for the reason that they are wholly irreconcilable....

Petitioner is denied equal protection of the laws under the U.S. Constitution because Ohio judgments construing uniformity under Article II, Section 26 of Ohio's Constitution, by the Ohio Supreme Court's own admission, cannot be reconciled.

Uniformity and equal protection of the laws, if they are not identical concepts,

are certainly kissing cousins. Because of the nexus of these concepts one to the other, it is manifest that the state courts below in dealing with Respondent's challenge to Article II Section 26 of the Ohio Constitution had a fair opportunity to deal with the equal protection of the laws under the United States Constitution in adjudicating that issue.

It would seem that all the courts below in dealing with Article II Section 26 of the Ohio Constitution would be mindful of the equal protection of the laws issue of the Fourteenth Amendment to the U S Constitution because the legal concepts are so similar in purpose as to be nearly identical.

Petitioner contends that it is entitled to the foregoing inference under the presumption of regularity of the proceedings below.

CONCLUSION

For all the above reasons the Petition for Writ of Certiorari should be granted.

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DISTRIBUTED
APR 26 1993

ORIGINAL

Court, U.S.
FILED
APR 23 1993
OFFICE OF THE CLERK

NO. 92-1499

* * * *

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1992

* * *

PUT-IN-BAY ISLAND TAXING
DISTRICT AUTHORITY

Petitioner,

v.

COLONIAL INC.

Respondent.

PETITIONER'S REPLY IN OPPOSITION TO RESPONDENT'S MOTION FOR AWARD OF DAMAGES AND COSTS

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Petitioner Put-In-Bay Island Taxing District Authority hereby requests this Court to deny Respondent's Motion for Award of Damages and Costs.

In a concurring opinion by Justices Powell and Brennan, in Webb v. Webb, 451 U.S. 493, at 501, it was stated, "...that this court has jurisdiction to review plain error unchallenged in state court when necessary to prevent fundamental unfairness."

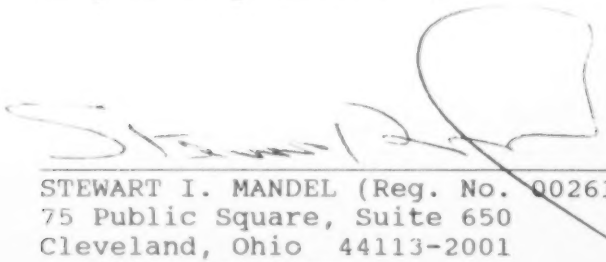
This case, wherein Petitioner seeks a Writ of Certiorari, falls within the ambit of this Court's jurisdiction because the decision of the Ohio Supreme Court was clearly in error and fundamentally unfair for the reasons set forth in the Writ of Certiorari and Reply filed with this Court. In finding the legislation passed by the Ohio Legislature unconstitutional, the Ohio Supreme Court exceeded its judicial authority and violated the separation of powers doctrine.

Petitioner has a basis for its claim with respect to the issue of jurisdiction, and the matter addressed in the Writ filed before this Court has substantive merit.

CONCLUSION

WHEREFORE, for the foregoing reasons, Petitioner prays that Respondent's Motion for Damages and Costs be denied.

Respectfully submitted,



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